U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 April 2007

CASE NO: 2007-STA-00004

In the Matter of:
AHARON EVANS,
Claimant**,**

vs.

GAINEY TRANSPORTATION SERVICES, INC.,
Employer.

Appearances: **Aharon Anthony Evans,** *Pro se*
Lakewood, Washington

Joseph J. Vogan
Varnum, Riddering, Schmidt & Howlett, LLP
Grand Rapids, Michigan
For Respondent

Before: **Russell D. Pulver**
Administrative Law Judge

Recommended Decision and Order

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 31105 of the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), 49 U.S.C. § 31105. Aharon Anthony Evans ("Complainant") alleged that his former employer, Gainey Transportation Services, Inc. ("Respondent") terminated him in August of 2006 because he complained of air conditioning problems and diesel fumes and subsequently refused to drive his commercial vehicle because of those problems. On August 14, 2006, Complainant lodged a formal complaint with Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor, for violation of the Act.

On November 28, 2006, Complainant objected to the determination made by OSHA and requested a hearing before the Office of Administrative Law Judges ("OALJ"), U.S. Department of Labor. [1] A hearing was originally scheduled for December 19, 2006 in Tucson, Arizona. However, on December 11, 2006, Respondent filed a motion to postpone the hearing date and transfer the place of hearing from Tucson, Arizona to Grand Rapids, Michigan. On December

[1] On November 14, 2006, OSHA issued a Findings and Preliminary Order that found the complaint meritless. However, OSHA's investigative findings were given no deference in this Court's de novo review of this case.

14, 2006, the undersigned continued the hearing to December 28, 2006, denied Respondent's transfer request, and in response to notification of Complainant's change of residence, transferred the location of the hearing to Seattle, Washington. A hearing was held on the merits in Seattle, Washington on December 28, 2006. Respondent was represented by counsel and Complainant, appearing *pro se*, testified on his own behalf. Thurman Taylor and Steven Steinberg testified on behalf of Respondent. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The follow exhibits were admitted to the record: Administrative Law Judge's exhibit (AJX) 1-5 and Respondent's exhibits (EX) 1-16 and 18-20.

Stipulations

1) There was an employer/employee relationship at the time of the alleged adverse action.

2) Complainant was terminated on August 9, 2006.

Issues

1) Whether Complainant engaged in protected activity as defined by the STAA.

2) Whether Respondent was motivated by a discriminatory purpose when it terminated Complainant's employment.

Findings of Fact

Complainant began working for Respondent, an over-the-road trucking service, on or around May 26, 2006. AJX 5 at 3-4.[2] He had an orientation training program from May 30, 2006 through June 28, 2006. TR at 66-68. Complainant was initially assigned to be supervised by Driver Manager Colton Jameson. In his first business plan meeting, on June 28, 2006, Complainant called Mr. Jameson a woman. TR at 75-77, 218; EX 14. Complainant testified that Mr. Jameson looks like a "he/she" and referred to him as looking like he has "boobs" like a woman. TR at 75-76, 218. Mr. Taylor immediately reassigned Complainant to a new Driver Manager, Steven Steinberg. AJX 5 at 5, TR at 189-193.

During the period from July 1, 2006 through July 21, 2006, Complainant reported on three occasions that his air conditioning was not working properly. EX 8 at 12-14, 18-20; TR 154-169. Complainant testified that he felt faint from the extreme heat and thought it was an unsafe condition to continue driving without air conditioning. AJX 5 at 7. On July 3, 2006, Complainant initially reported problems with the air conditioning over the phone to his driver manager. Complainant testified that he began submitting complaints over the Qualcomm, the

[2] Complainant's interview with the OSHA investigator on August 18, 2006 was admitted at trial as Complainant's testimony. *See* AJX 5, generally. Complainant reviewed the interview transcript and testified to the accuracy of his responses. TR at 53.

satellite-based mobile system used by Respondent to communicate with its truck drivers. AJX 5 at 6. To resolve the air conditioning problems, Respondent authorized Complainant to take the truck in to be repaired and also authorized Complainant to stay in a hotel. EX 9 at 4, TR at 79-80, 154-169. Complainant was told to go to a hotel but he did not. AJX 5 at 10. On July 4, 2006, Complainant was instructed to take the truck to a Freightliner dealer for repairs. EX 9 at 6. He did so and it remained at the Valley Freightliner shop until July 8, 2006. TR at 159; EX 9 at 7.

On July 15, 2006, Complainant was tired from driving in the heat without air conditioning and refused to take a load. AJX 5 at 18-20. Complainant testified that he felt it would be dangerous because he could not control the truck due to his fatigue. AJX 5 at 20. Respondent authorized service on the air conditioning and two nights at a hotel. EX 9 at 23. Mr. Taylor testified that Complainant's truck was brought in for repairs on or about July 16, 2006. TR at 196-197; EX 11 at 9. The repair order detail report indicates that after performing dye tests for leaks and running the air conditioning, no problems could be found and the air conditioning system was functioning properly. EX 11 at 9. The report further notes that the person who completed the work on the truck showed Complainant how to operate the air conditioning. EX 11 at 9. Complainant testified that he lost air conditioning again on July 18, 2006 and became fatigued. He took the truck to the shop and was authorized to pick up a new truck. AJX 5 at 31.

On July 22, 2006, Complainant received a different truck. EX 8 at 21-22; TR at 83-84, 171-172. The air conditioning problems were thus resolved. AJX 5 at 31; TR at 85. According to Complainant's testimony, he experienced diesel odor and fumes in the cab of his second truck shortly after he picked it up. AJX 5 at 34-35. On July 29, 2006, Complainant subsequently refused to drive. TR at 120-122. Complainant did not explicitly cite diesel fumes as the reason for refusing to drive. TR at 120-122. At the hearing, Complainant argued that by generally reporting violations of the 49 C.F.R. regulations on his driver logs, it could be inferred that he was communicating issues concerning diesel fumes. TR at 122. Respondent authorized Complainant to take the truck to a repair shop. AJX 5 at 36. The truck was repaired on the weekend of July 29-31, 2006 while Respondent paid for Complainant to stay at a hotel. EX 12 at 6-8.

On August 3, 2006, Complainant sent a letter to the owner of the company, Harvey Gainey. TR at 125. The letter does not mention the alleged protected activity. *See* EX 13, generally. Complainant makes no specific reference to the problems with the air conditioning, diesel fumes or refusals to drive. TR at 126; *See* EX 13, generally. In the letter, Complainant suggested that Mr. Gainey was a "hypocrite" and that the company was being run by "sycophants." TR at 125; EX 13 at 1.[3]

[3] In a letter addressed to Harvey Gainey, Complainant wrote, *"Are you a hypocrite or a business man? Stage actors, hypo-cryts, adopt what ever behavior satisfies the audience. He who has the purse makes the rules. You have the purse. You make the rules. Sycophants will adopt what ever behavior is needed to narcotically stun the threat – You have sycophants Mr. Gainey….Competence is always promoted to its highest level of incompetence. You are rich. Act now and stay rich. Ignore me and watch."* EX 13 at 1-2.

Thereafter, on August 9, 2006, Complainant met with Harvey Gainey, Owner of Gainey Transportation Services, Inc., Thurman Taylor, Director of Driver Relations, Larry Umfleet, Fleet Manager, and Steve Steinberg, Complainant's Driver Manager in Grand Rapids, Michigan. Mr. Gainey stated that the purpose of the meeting was to discuss the words describing him and his company in Complainant's letter. TR at 126–127; EX 15 at 1.[4] Complainant testified that the reason he wrote the letter was that he felt the company did not do anything about his air conditioning. TR at 200. At the meeting, Mr. Steinberg responded that he had taken action in response to the air conditioning complaints and left the meeting to retrieve the Qualcomm records. TR at 200. At that point, Complainant commented that Mr. Gainey did not know what the words in the letter meant. EX 15 at 1; TR at 127. Mr. Gainey replied that he did know the meaning of the words and would get a dictionary to show Complainant the definitions. EX 15 at 1; TR at 200-201, 203-204. At that point, Complainant made a comment to Mr. Gainey that the definitions would be "coming out of the Gainey Dictionary." TR at 201-204. In response, Mr. Gainey threw his hands up, shook his head and left the room. TR at 205. Mr. Gainey indicated in a written statement on October 5, 2006, that in leaving the room he had decided that he was done trying to have a reasonable conversation with Complainant. EX 15 at 1. After both Mr. Steinberg and Mr. Gainey had left the room, Mr. Taylor informed Complainant that he was not a "good fit" for the company and terminated his employment at that time. TR at 204-205. Respondent made arrangements to help Complainant return to his home and continued to pay his wages until the end of the week of transport. TR at 142.

Conclusions of Law

The STAA prohibits discrimination against an employee who refuses to operate a vehicle when "the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health" 49 U.S.C. § 31105(a)(1)(B)(i). Congress extends whistleblower protection to employees in the transportation industry because these employees are often best situated to discern safety violations. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

Where, as here, a Complainant relies on circumstantial evidence, a prima facie case may be established by proving three elements: (1) that he engaged in protected activity under the Surface Transportation Assistance Act; (2) that he was the subject of adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of his employer. *See Moon v. Transport Drivers,* 836 F.2d 226, 229 (1987). Where a case has been tried fully on the merits, however, there is no particular need to determine whether the employee has established a prima facie case. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983) (Title VII). Instead, the relevant inquiry is whether an employer was motivated by a discriminatory purpose when it took adverse action against a complainant. *Pike v. Public Storage Companies, Inc.*, ARB 99-072, ALJ 1998-STA-35 (ARB Aug. 10, 1999). The ultimate burden of persuasion remains on Complainant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

[4] EX 15 is a statement by Harvey Gainey, owner of Gainey Transportation Services, Inc., which was taken on October 5, 2006. The statement was not under oath; however, factual statements were corroborated by other sworn testimony at the trial.

Protected Activity

A person may not discharge an employee because the employee has filed a complaint related to a violation of a commercial motor vehicle safety regulation. 49 U.S.C. § 31105(a)(1)(A). The STAA protection also extends to a driver's refusal to drive because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health. 49 U.S.C. § 31105(a)(1)(B)(i). Pursuant to the Department of Transportation vehicle safety regulations, a driver shall not drive while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe to drive. 49 C.F.R. §392.3.

Complainant alleges he was fired because he reported safety violations and made two refusals to drive. Specifically, he complained about the air conditioning in his truck not working properly and diesel fumes in a second truck he was given to drive on July 22, 2006. Respondent argues that Complainant's grievances do not constitute safety complaints.

Complainant testified that he felt unsafe driving due to the heat exhaustion he was experiencing from not having air conditioning while driving in above 95 degree heat during the month of July. TR at 102; AJX 5 at 13. He bought Gatorade on July 14, 2006 to alleviate the effect of the heat. AJX 5 at 17. It is reasonable to conclude that due to the effects of the heat, Complainant could become dehydrated and fatigued, impairing his ability and alertness. Therefore, I find Complainant's reports of problems with the air conditioning may be considered a safety complaint pursuant to the regulations. *See* 49 C.F.R. §392.3. I also find that Complainant's refusals to take loads on two separate occasions were in response to fatigue due to heat and diesel fumes. TR at 120. Thus, I conclude that Complainant's refusals to drive are protected activity under the STAA.

Discriminatory Purpose

Pursuant to 49 U.S.C. § 31105, a person may not discharge an employee because: (1) the employee has filed a complaint of a violation of a commercial motor vehicle safety regulation, (2) the employee refuses to operate a vehicle because the operation violates a regulation or standard related to commercial motor vehicle safety or health, or (3) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. An employer's discharge decision must be motivated by retaliation to be actionable. *Clement v. Milwaukee Transport Services, Inc.,* ARB 02-025, ALJ 2001-STA-6 (ARB Aug. 29, 2003).

Complainant alleges that he was terminated as retaliation for his protected activity. He claims discrimination for reporting safety problems via the Qualcomm communication system used by Respondent. However, Respondent offers its record of Qualcomm communication messages between the Driver Manager and Complainant as evidence of the company's repeated efforts to address Complainant's concerns with the condition of the trucks. *See* EX 9, generally. Respondent repeatedly urged Complainant to take the truck to be repaired and offered to arrange for a hotel for Complainant on more than one occasion. EX 9 at 2, 4-11, 27-28. Respondent also provides multiple repair order detail reports as evidence of the action taken to repair the trucks

that Complainant drove while working for Respondent. *See* EX 11 at 1-10; EX 12 at 1-14. Furthermore, Respondent submitted Complainant's driver logs which indicate that Complainant checked a box to indicate that the vehicle condition was "satisfactory" from July 3, 2006 through July 9, 2006, July 15, 2006, and July 17, 2006 through July 19, 2006. EX 8 at 3-9, 15, 17-19. The driver logs also indicate that Complainant wrote that he did not have working air conditioning from July 17, 2006 through July 21, 2006. In response to those concerns, Respondent took action by giving Complainant a different truck on July 22, 2006. EX 8 at 17-22. I find that this indicates Respondent promptly acted to remedy the problems when Complainant clearly communicated his concerns. The evidence indicates Respondent acknowledged the complaints, advised a course of action for Complainant to safely resolve the issues with the truck, and took action to ameliorate the problems by authorizing hotel stays as well as ultimately providing Complainant with a new truck. *See* EX 9 at 1-30; EX 11 at 1-10; EX 12 at 1-14.

Additional evidence weighs against a finding that Respondent acted with a discriminatory purpose. Specifically, there are other drivers currently employed by Respondent that have complained of air conditioning problems as well as diesel fumes. TR at 235-236. Mr. Steinberg testified that the reporting of such problems is neither unusual nor viewed as being grounds for discharge. TR at 177. Also, no disciplinary action was taken against Complainant after he refused to drive on two occasions throughout his course of employment. TR at 118-119. After Complainant refused to drive on July 29, 2006, the truck was in the repair shop from July 29 through July 31, 2006 and subsequently Respondent continued to assign loads to Complainant. TR at 123-124. Thus, Complainant did not suffer any loss of opportunity to work but rather he remained gainfully employed up until the August 9, 2006 meeting. TR at 123. These events provide no evidence to suggest that Complainant was fired for lodging complaints about the condition of the trucks he drove while employed by Respondent.

Complainant's claim of causation is further discredited when considering his history of offensive insubordination and rude behavior starting from the beginning of his employment with the company. EX 14. On June 28, 2006, Complainant's first day of work after training, he exhibited offensive behavior toward his original Driver Manager, Mr. Jameson by referring to him as a "he/she." TR at 75-76, 218. Complainant was immediately reassigned to a new Driver Manager after making such inappropriate remarks toward his superior. Later in his employment, Complainant insulted the owner of the company by sending him a letter asking him if he is a "hypocrite or businessman," and suggested the company is being run by "sycophants." EX 13 at 1. After considering the evidence, I find that Complainant had established a pattern of rude and offensive behavior toward his superiors rising to the level of insubordination while employed by Respondent.

Other evidence weighing against a finding of a discriminatory purpose involves the lack of temporal proximity between the adverse action and the protected activity. The complaints about air conditioning problems were made by Complainant in July and action was promptly taken to repair the problems. The company resolved the issues by giving Complainant a new truck on July 22, 2006. AJX 5 at 31. The termination of Complainant occurred on August 9, 2006, more than weeks after the resolution of the air conditioning complaints. Problems of diesel odor were similarly resolved by prompt repair and authorization for accommodations for

Complainant while repairs were completed. EX 12 at 4-9. All of Complainant's safety concerns had been resolved by the company well before the date of the August 9, 2006 meeting regarding Complainant's letter. EX 8 at 32. Complainant testified that he was motivated to write the letter to Mr. Gainey because of the problems he had faced with the air conditioning repair. TR at 125-126. Yet, Complainant conceded in his testimony that there is absolutely no mention of the specific safety complaints or refusals to drive in the letter sent to Mr. Gainey. TR at 126. Thus, I find that this evidence fails to establish a connection between the protected activity and the adverse employment action.

In contrast, the evidence strongly supports a finding of temporal proximity between Complainant's inappropriate behavior and the adverse action. The termination of Complainant's employment occurred on the same day of the meeting to discuss the content of Complainant's offensive letter to Mr. Gainey. In the meeting, Complainant made derogatory comments to Mr. Gainey and repeated the offensive language contained in the actual letter. Specifically, at the meeting, Complainant admitted to calling Mr. Gainey a "hypocrite" and stated that Mr. Gainey had "sycophants" working for him and Mr. Gainey did not even understand the meaning of these terms. EX 15; TR at 126-127, 200-201, 203-204. Shortly after the meeting with Mr. Gainey, Mr. Taylor terminated Complainant's employment. TR at 205. The facts illustrate a close temporal proximity between the adverse action and the rude and offensive behavior of Complainant during the August 9, 2006 meeting, a meeting which itself was called to address the letter Complainant wrote that contained offensive language.

Respondent contends that Mr. Taylor did not have knowledge of safety complaints or refusals to drive because Complainant did not report the concerns directly to Mr. Taylor, and that therefore Mr. Taylor's decision to terminate Complainant was not motivated by Complainant's protected activity. Mr. Taylor testified that he did not receive any of Complainant's Qualcomm messages referring to safety issues. TR at 219-220. However, Mr. Taylor became aware of the problems with the air conditioning in Complainant's truck when it was brought up at the August 9, 2006 meeting to which he was present. TR at 200. Complainant testified that he stated at the meeting that the reason he wrote the letter was that he felt the company did not do anything about his air conditioning. *Id*. Thereafter, Mr. Steinberg responded that he did do something about the air conditioning and exited the meeting to retrieve the records. *Id*. I find that Mr. Taylor's presence at the meeting is sufficient to conclude that he was made aware that Complainant had reported problems concerning the air conditioning in his truck.

While Mr. Taylor had some knowledge of the problems reported by Complainant, evidence supports a finding that those complaints were not a motivating factor in his decision to terminate Complainant. The problem with the air conditioning was never explicitly referred to as a safety issue at the meeting. TR at 203. In fact, Complainant testified that there was no discussion of safety issues during the meeting with Mr. Gainey. TR at 130-131. Complainant admitted in his testimony that the focus of the meeting was the language he used in the letter to Mr. Gainey. TR at 132; AJX 5 at 41. In addition, the sequence of events indicates that Complainant's insubordination toward his superiors was the motivating factor in Mr. Taylor's decision to terminate Complainant. First, Mr. Taylor had knowledge of Complainant's inappropriate behavior toward Complainant's original Driver Manager, Colton Jameson, on June 28, 2006. TR at 193; EX 14. Mr. Taylor was responsible for reassigning Complainant after Mr.

James said he could not work with Complainant. EX 14. Second, Mr. Taylor testified that he had not read the August 3, 2006 letter sent by Complainant to Mr. Gainey until August 9, 2006, the date of the meeting at which Complainant's employment was terminated. TR at 216. Thus, Mr. Taylor was made aware of Complainant's rude and offensive language immediately prior to the meeting in which he terminated Complainant. Mr. Taylor testified that he decided to terminate Complainant because he felt that Complainant was insubordinate. TR at 205. These facts overwhelmingly establish a legitimate, non-discriminatory basis for Complainant's termination. Thus, I conclude that Mr. Taylor based his decision to terminate Complainant on the knowledge of Complainant's insubordination.

Based on these facts, I find Respondent was not motivated by a discriminatory purpose. There is a lack of temporal proximity between the complaints of safety problems and the adverse action, an absence of disciplinary action taken against Complainant following refusals to drive, as well as the continued employment of other drivers that have reported comparable safety complaints. Thus, Complainant fails to establish that his protected activity was a motivating factor to his termination. While the August 9, 2006 meeting arose out of Complainant's letter which was apparently motivated by his safety concerns, the letter itself and the ensuing meeting did not specifically address Complainant's safety concerns. TR at 130-131. Furthermore, when informed that there were problems with Complainant's truck, Respondent took immediate steps to correct these problems. In fact, no safety issues existed at the time of the August 9, 2006 meeting. Yet, in spite of the company's actions to remedy the reported problems, Complainant took it upon himself to write an offensive and insulting letter to the owner of the company. The preponderance of the evidence supports the finding that it was Complainant's insulting words that ultimately caused him to be fired.

For the reasons stated above, I find Complainant failed to meet his burden to prove by a preponderance of evidence that Respondent acted with a discriminatory purpose. I find that Complainant was discharged on the basis of his insubordinate behavior. Respondent's decision to discharge Complainant was not motivated by retaliation for protected activity. Thus, I conclude that Respondent's stated reason for firing Complainant on August 9, 2006 was the true reason for the termination.

ORDER

Based on the above findings of fact and conclusions of law, the complaint is hereby **DISMISSED**.

A

Russell D. Pulver
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judges' Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and